IN THE HIGH COURT OF BOMBAY AT GOA
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TAX APPEAL NO. 66 OF 2002 WITH TAX APPEAL NO. 5 OF 2003
AND TAX APPEAL NO. 6 OF 2003

TAX APPEAL NO. 66 OF 2002

The Commissioner of
Income Tax, having office
at Aayakar Bhavan, Patto
Plaza, Panaji, Goa. ... Appellant.

Versus

M/s Sesa Goa Ltd.,
having office at
Rua de Ourem, Panaji,
Goa. ... Respondent.

Shri S. R. Rivonkar, Advocate for the appellant.

Shri V. Frank, advocate for the respondent.

TAX APPEAL NO. 5 OF 2003

The Commissioner of Income
Tax, having office at
Aayakar Bhavan, Patto
Plaza, Panaji, Goa. ... Appellant

Versus

M/s. D. B. Bandodkar &
Sons Pvt. Ltd.,
Dr. Atmaram Borkar Road,
Panaji, Goa. ... Respondent

Shri S. R. Rivonkar, advocate for the appellant.

Shri M. S. Usgaokar, Senior Advocate with Ms. Swati Kamat, advocate for the respondent.

TAX APPEAL NO. 6 OF 2003

The Commissioner of
Income Tax, having office
at Aayakar Bhavan, Patto
Plaza, Panaji, Goa. ... Appellant

Versus

Chowgule & Company Ltd.,
having office at Chowgule
House, Marmagao Harbour,

Marmagao Goa. ... Respondent.

Shri S. R. Rivonkar, advocate for the appellant.

Shri S. N. Inamdar with Shri A. D. Bhobe, advocates for the respondent.

CORAM : F. I. REBELLO &
P. V. HARDAS, JJ.

DATE : 16th July, 2003.

ORAL JUGMENT (per Rebello, J.)

All these appeals are being disposed of by a common order as the same question of law arises in them, except for the amounts. The question of law as formulated by the Department reads as under:-

> "Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the assessee is entitled for deduction on investment allowance under Section 32-A of the Income Tax Act, in respect of machinery used in mining activity, ignoring the fact that the assessee is engaged in extraction and processing of iron ore, not amounting to manufacture or production of any article or thing?"

It is not necessary to refer to all the previous orders, except that the ITAT in appeal filed by the Deputy Commissioner of Income Tax against M/s D. B.Bandodkar and Brothers on the issue of investment allowance had relied on the Judgment of the Karnataka High Court in the case of **Commissioner of Income-Tax vs. Gogte Minerals (No.2), 225 ITR 60**, wherein a Division Bench of the Karnataka High Court had held that mining operations being carried out for excavating iron ore, amount to manufacture.

2. It is the contention on behalf of the Revenue that extracting/raising of iron ore does not amount to manufacturing activity and, consequently, such an assessee would not be entitled to the benefit under Section 32-A of the Income Tax Act, 1961 (hereinafter referred to as "the said Act"). It is then contended that reliance placed on the judgment of the Division Bench of the Karnataka High Court, was mis-placed as the Apex Court in the case of **Commissioner of Income-Tax vs. N. C. Budharaja & Co. & Anr., 204 ITR 412,** has explained what is "manufacture" and "production". These tests as explained by the Apex Court had not been considered by the learned Division Bench of the Karnataka High Court in the case of **Commissioner of Income-Tax vs. Gogte Minerals (No.2)** (supra). It is further pointed out that the Apex Court in **Commissioner of Income-Tax vs. Mysore Minerals Ltd., (2001) 247 ITR 0301,** has set aside the order therein and the High Court has been directed to refer the issue for decision. In those circumstances, it is set out that the issue does not stand concluded and consequently, the issue is open for consideration. It is also pointed out that are Judgments of other High Courts, which Judgments had not been taken into consideration and, in these circumstances, it is pointed out that the appeals filed by the Revenue should be allowed.

On the other hand, on behalf of the respondents, learned counsel who have argued the matter have principally

urged as under:-

The ore is raised from the earth. The ore then undergoes various processes. The ore as removed is then sequestered and after applying various processes it is made ready for export and exported. The ore thus extracted is not the same article or thing as is exported. Reliance is placed on the provisions of the Mineral Conservation and Development Rules, 1958 Form H-1, to point out that the expression used therein is "production". It is pointed out that this can be relied upon as the language expressly used is "production" of ore. These rules and expressions will have to be read into and considered while considering the ordinary meaning o the word in Section 32-A of the said Act.

It is then submitted that an assessee earlier was entitled to development rebate considering Schedule V to the said Act. Development rebate is no longer available considering the Notification No.S.O.2167 dated 28th March, 1971, which has discontinued grant of development rebate in respect of ships acquired or machinery or plant installed after 31st May, 1974. However, it has been continued for a limited period in certain cases from lst June, 1974 to 31st May, 1977. It is then pointed out that Section 32-A was introduced by the Finance Act 1976 with effect from lst April, 1976. If the language in Section 32-A (b)(b)(iii) is considered alongwith the language in Section 33(1)(b) (B) and

considering that mineral ore does not fall in Schedule 11, the intent of Parliament is clear that though development rebate is excluded, the benefit of investment allowance has been made available.

It is next contended that the Act itself contains internal evidence which would show that raw ore is being treated differently from processed ore and for that purpose reliance is placed on Section 80-HHC (2)(b)(ii) of the said Act. It is also contended that the provision is a beneficial provision and that being the case, the Court should given intent to the mandate of Parliament.

Lastly, it is contended that various High Courts have taken the view that in respect of mining operations, the benefits of Section 32-A can be availed of by a person/company involved in the business of mining. there is no view to the contrary taken by any other High Court and in these circumstances, the appeal preferred by the Revenue ought to be rejected.

3. Considering the various contentions, in our opinion, the issue can now be decided. For the applicability of Section 32-A an assessee must satisfy the following three requirements:-

(i) The machinery should be owned by the assessee;

(ii) It should be wholly used for the purpose or business carried on by the assessee;

(iii) The machinery must come under any of the categories specified in Section 32-A sub-section (2); (See **Commissioner of Income-Tax vs. Shaan Finance (P) Ltd., 231 ITR 308**).

The various steps in the mining operations have been identified by the Apex Court in **Chowgule & Co. Pvt. Ltd. & Anr. vs. Union of India & Ors., 47 STC 323.** The processes involved in mining ore commencing from extracting of iron ore to selling it for export are identified as under:-

(i) extraction of ore from the mine;

(ii) conveying the ore to the dressing plant;

(iii) washing, screening and dressing the ore;

(iv) conveying of the ore from the mine site to the riverside;

(v) transport of the ore from the river side to the harbour by means of barges;

(vi) stacking of the ore at the harbour in different stock piles according to its physical and chemical composition; and

(vii) blending of the ore from different stock piles with a view to producing ore of the required specifications and loading it into the ship by means of mechanised ore handling plant.

The respondents had also placed material before the ITAT in respect of these various steps. There is no dispute that the respondents satisfy the first two tests as laid down in **Commissioner of Income-Tax vs. Shaan Finance (P) Ltd.,**

(supra), namely that the machinery is owned by the assessee and it is used for the purpose of the business of mining carried out by the assessee. What is required to be answered is the third issue, namely whether the machinery is used for the purpose of construction, manufacture or production. We are really not concerned with the expression construction in this case. The point as framed by the Revenue for determination is that extraction of ore does not amount to manufacture. The issue as framed really does not cover the other aspect, whether it amounts to production.

4. However, considering the question advanced at the Bar and the oral submissions and as ITAT has proceeded on the footing that it amounts to manufacture/production, we will consider the issue whether extraction of iron ore will fall within the expression "manufacture" or "production". Both the terms, in our opinion are no longer **res integra**, insofar as income-tax is concerned as they have been the subject-matter of various judgments, either under the Sales Tax Act or Central Sales Tax Act and which have been approved under the Income-Tax Act.

Insofar as "manufacture" is concerned, a classic exposition of the law would be as set out by the Apex Court in the case of **Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam vs. PIO Food Packers, 46 STC 63.** The expression, "manufacture" was being considered in

the context of the provisions of the Kerala General Sales Tax Act. The Apex Court while answering the issue on "manufacture", held that the test for considering whether it amounts to manufacture is to be applied thus:- Does the processing of the original commodity bring into existence a commercially different and and distinct article? Explaining the issue, the Apex Court observed as under:-

> "Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can o longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."

This test which was considered by the Apex Court under the Kerala General Sales Tax Act came up for consideration before the Apex Court in the case of **Aspinwall & Co. Ltd. vs. Commissioner of Income Tax, Ernakulam, (2001) 7 SCC 525.** In paragraph 14, the Apex Court observed that what would amount to manufacturing activity has been considered in the case of **Deputy Commissioner of Sales Tax (Law), Board of Revenue**

(Taxes) vs. Pio Food Packers (supra) and the test for determination whether "manufacture" can be said to have taken place is whether the commodity which is subjected to process or manufacture can no longer be regarded as the original commodity, but is recognized in the trade as a new and distinct commodity. In other words, even for the purpose of income-tax the same test has been applied, considering that the expression "manufacture" has not been defined under the Income-Tax Act. We may, at this stage also note that in **Union of India & Ors. vs. Delhi Cloth and General Mills Co. Ltd. & Ors., 1977 ELT (J 199),** the Apex Court noted that the word "manufacture" used as a verb is generally understood to mean as bringing into existence a new substance and does not mean merely "to produce some change in a substance", however minor in consequence the change may be. Reliance was placed on a passage quoted from Permanent Edition of Words and Phrases, Vol.26, from an American judgment, and the passage reads as under:-

> "Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive nature, character or use."

For the purpose of finding out whether mining operation would amount to manufacture, gainful reference again may be made to the judgment of the Apex Court in the case of **Chowgule & Co. (Pvt.) Ltd.,** (supra). Considering

the test as to when manufacture can take place, the Apex Court answered the issue as under:-

> "The test that is required to be applied is; does the processing of the original commodity bring into existence a commercially different and distinct commodity? On an application of this test, it is clear that the blending of different qualities of ore possessing differing chemical and physical compositions as to produce ore of the contractual specifications cannot be said to involve the process of manufacture, since the ore that is produced cannot be regarded as a commercially new and distinct commodity from the ore of different specifications blended together. What is produced as a result of blending is commercially the same article, namely, ore, though with different specifications than the ore which is blended and hence it cannot be said that any process of manufacture is involved in blending of ore."

The Apex Court thereafter proceeded further and observed as under:-

> "Now there can be no doubt, and indeed this could not be seriously disputed that the process of mining comes to an end when ore is extracted from the mines, washed, screened and dressed in the dressing plant and stacked at the mining site and the goods purchased by the assessee for use in the subsequent operations could not therefore be regarded as goods purchased for use 'in mining'."

The Apex Court in the case of **Commissioner of Income-tax vs. Budharaja (N.C.) & Co.**(1993)204 ITR 0412, has again reiterated the expression "manufacture" used in **Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam vs. Pio Food Packers,** (supra). The Apex Court

noted both the words "manufacture " and "production" have received extensive judicial attention both under the Income-tax Act as well as the Central Sales Tax Act and various Sales Tax laws. It further observed that the expressions "manufacture" and "production" are normally associated with movable articles and goods, big and small. We may now consider some of the judgments of the High Courts relied upon by the learned counsel for the purpose of finding out whether extraction or raising of ore would amount to manufacture or production, considering the entire process from the stage of extraction till its export as it would be an integral part of the business of mining. The first case we have before us is **Commissioner of Income-tax vs. Gogte Minerals,** (supra). It is no doubt true that in this case the test as applied in the case of **CIT vs.. N. C. Budharaja & Co** (supra), was not considered. The case involved excavation of iron ore. The Division Bench of the Karnataka High Court considering the issue, observed, that what was being considered was mining operation carried out for excavation of iron ore and sequestering of some other materials. It involves a process and there is a complete transformation of material from one form to another altogether and does not continue to be in the same form, as was found in the earth before excavation. When such complicated process is involved, it cannot be said that there is no manufacturing activity because what is brought into existence is iron ore. Thus it must be stated that the process involved is a

manufacturing activity. It may be noted that what the Division Bench of the Karnataka High Court observed was that mere removing from the earth by itself is not manufacture, but various process which thereafter are applied would amount to manufacture. The next Judgment we have is the case of **Commissioner of Income-Tax vs. Mysore Minerals Ltd.,** (2001) 250 ITR 725. This was a case in respect of mining of granite. The Division Bench held that it would amount to manufacture relying on an earlier Judgment in the case of **CIT vs. Mysore Minerals Ltd., (1994) 205 ITR 461.** The criticism against this Judgement is that this Judgement relied upon an earlier Judgment in the case of **Mysore Minerals,** which has been reversed by the Apex Court in **CIT vs. Mysore Minerals Ltd.,** (supra), and as such would no longer be good law. Considering that aspect, we do not propose to consider the ratio of the said Judgment. The next Judgment relied upon is **Deputy Commissioner of Income-Tax vs. Mysore Minerals Ltd., (2001)**250 ITR 730. In this case also what was involved was mining of granite. The learned Division Bench of the Karnataka High Court relied upon the Judgment in **CIT vs. N. C. Budharaja,** (supra) and explained and distinguished it. In that case the process involved extracting granite and converting it into slabs, cutting and polishing them. This was held to be a manufacturing activity. In **CIT vs. Mysore Minerals Ltd. (No.2) (201) 250 ITR 728,** again the matter involved granite. The Division Bench observed that it stands concluded in view of the Judgment in **CIT vs. Mysore Minerals**

Ltd. (supra).

Therefore, if the tests as laid down in the Judgments of the Apex Court and considered in the various Judgments of the High Courts and even considering that various processes are involved, would mere extraction of iron ore from the earth amount to "manufacture"? In the instant case, considering the material on record, as noted by the Apex Court, iron ore is merely extracted by removing the top soil. That by itself would not amount to manufacture, if the tests considered by the Apex Court in its various Judgments are applied. In **Chowgule & Co. Pvt. Ltd. vs. Union of India & Ors.** (supra), which was a case under the Central Sales Tax Act and what was under consideration was Section 8 and Rule 13 of the Rules, the Apex Court held that even if the various processes are applied, it is commercially the same article, namely, ore. The composition may change, the content may change, but as noted by the Apex Court, the ore extracted commercially continues to be ore. It would, therefore, not be possible for us to accept the contention that extractions of ore and the various processes which it undergoes until it is sold amounts to "manufacture". In our opinion,the various processes applied do not amount to "manufacture" and, consequently, it would be difficult to hold that the extraction of ore amounts to "manufacture".

5. The question, however, does not rest there,

considering what has been held by the ITAT and the questions which have been raised here. The question there is whether extraction of ore and the various processes would involve "production". The expression "production" again is no longer **res integra,** having been considered by the Apex Court in the case of **CIT vs. N. C. Budharaja & Co,** (supra). The Apex Court noted in the said Judgment that the word "production" or "produce" when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. Three High Courts at least, have taken the view that the extraction of ore would amount to "production". We first have the Judgment of the Andhra Pradesh High Court in **Commissioner of Income-Tax vs. Singareni Collieries Co. Ltd., (1996)221 ITR 48.** A Division Bench of the Andhra Pradesh High Court was considering the expression "production". The Andhra Pradesh High Court noted the argument of the Revenue against the finding of the Tribunal which had held that extracting coal or winning coal from a coal mine is an article or thing produced. The argument was then noted that the contention of the Revenue that coal which is extracted from the mine is not an article or thing. What was contended is that winning or excavating coal is not an activity of production. The learned Division Bench then relied on the Judgment in the case of **CIT vs. Budharaja & Co.** (supra) and also placing reliance on Webster's New International Dictionary, for the word "produce", which is defined to mean "something that is

brought forth or yielded either naturally or as a result of effort and work". In Shorter Oxford English Dictionary, the meaning given is: "To bring forward, bring forth or out; to bring into being or existence". In Black's Law Dictionary, the expression "produce" is "to bring forward; to show or exhibit; to bring into view or notice; to bring to the surface". Considering the language used and also placing reliance on the provisions of Section 35 E of the Income-Tax Act, the learned Division Bench noted that "production of minerals" is used in the allied provisions of the Act itself and it is a definite point that Parliament employed the expression "production" to the minerals extracted from underneath the surface. For all those reasons, the learned Division Bench took the view that it amounted to "production". Another learned Division Bench of the Delhi High Court in **Commissioner of Income-Tax vs. Univmine (P) Ltd., (2002) ITR 825**, observed that mining of marble would amount to carrying on business of production and for that purpose placed reliance on the case of **Chrestien Mica Industries Ltd. vs. State of Bihar, (1961) 12 STC 150 (SC),** where the Apex Court held that the process of mining mica is a process of production. We also have the Judgment of another learned Division Bench of the Calcutta High Court in the case of **Commissioner of Income-Tax vs. G. S. Atwal & Co. (GUA), (2002) 254 ITR 592.** The Division Bench observed, taking into consideration the various contentions and Judgments which were involved, that winning of coal is

"production". The learned Division Bench considering the earlier Judgment of Chakravartti, C.J., which was latter on approved by the Supreme Court, where the Calcutta High Court had taken the view that winning of coal is no doubt "production".

From the dictionary meaning of what would amount to "production" and the Judgments of the Andhra Pradesh High Court, Delhi High Court and the Calcutta High Court, the question would be whether the view taken by the ITAT can be upheld on the ground that extraction or winning of ore would amount to "production". Our attention had been invited to Section 32-A to hold that considering items and goods not included in the Eleventh Schedule, they would be entitled to the benefit under Section 32-A of the said Act. Our attention was also invited that earlier under Section 33 of the said Act, an assessee would have been entitled to the benefit of development rebate, which is no longer available. Iron ore was specifically included in the Fifth Schedule and, consequently, was entitled to the development rebate. The Act also contains internal evidence to show that the Legislature has treated raw ore differently from processed ore. A Division Bench of this Court in **Commissioner of Income-Tax vs. Emirates Commercial Bank Ltd., (2003) 262 ITR 55,** has given the benefit even in respect of data processing done on computers. In other words, the legislation being a beneficial piece of legislation, an expanded meaning should

be so given and has to be given.

The ore has to be extracted or raised from the earth in which it is embedded and has to be brought to the surface. What is brought to the surface is something new which comes into existence, as an article or thing. If that be the case, winning or extracting of ore would fall within the expression "production". Once it falls within the expression "production", the assessee would be entitled to the benefit under Section 32-A of the said Act. That being the case, it would not be possible to interfere with the view taken by the ITAT in all the three Appeals.

In the light of that the Appeals as filed are rejected.

F. I. REBELLO, J.

P. V. HARDAS, J.

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